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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

REPLY BRIEF OF PETITIONER

WILLIAM L. DWYER
JOHN S. EBEL
13th Floor, Hoge Building
Seattle, Washington 98104

REMBERT RYALS
1177 Jadwin Avenue
Richland, Washington 99352
Counsel for Petitioner

Of Counsel:

CULP, DWYER, GUTERSON & GRADER
13th Floor, Hoge Building
Seattle, Washington 98104

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
1177 Jadwin Avenue
Richland, Washington 99352

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SUBJECT INDEX

Page

Argument In Reply 1

TABLES OF AUTHORITY

Table of Cases

A Book v. Attorney General of Massachusetts, 383 U.S. 413 (1966) 1, 4

Astro Cinema Corp. v. Mackell, 422 F.2d 293 (2d Cir. 1970) 9-10

Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969), cert.den. 397 U.S. 920 (1970) 9, 10

Bouie v. Columbia, 378 U.S. 347 (1964) 6, 7

Cohen v. California, 403 U.S. 15 (1971) 6, 8

Demich Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1970), reversed 39 U.S.L.W. 3424 (1971) 10

Drive In Theatres, Inc. v. Huskey, 305 F.Supp. 1232 (W.D.N.C. 1969), aff'd 435 F.2d 228 (4th Cir. 1970) 3

Freedman v. Maryland, 380 U.S. 51 (1965) 9

Ginzburg v. United States, 383 U.S. 463 (1966) 4

Goldberg v. Kelly, 397 U.S. 254 (1970) 8

Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968).. 4-5

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 6

Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968).. 10

Marcus v. Property Search Warrant, 367 U.S. 717 (1961) 9

Metzger v. Pearcy, 393 F.2d 202 (7th Cir. 1970) 10

Mod Amusement Company, Inc. v. Murphy, (S.D.N.Y. 72 Civ. 1 filed January 7, 1972) 9

NAACP v. Button, 371 U.S. 415 (1963) 5

New York Times v. Sullivan, 376 U.S. 254 (1964) 4

Page

People v. Heller, N.Y. Law Journal, Dec. 16, 1971 (N.Y., 1971) 9

Redrup v. New York, 386 U.S. 767 (1967) 5, 8

Roth v. United States, 354 U.S. 476 (1957) 2, 4

Shuttlesworth v. Birmingham, 382 U.S. 87 (1965) 6

State v. Miller, 365 P.2d 612 (Wash. 1961) 9

Thompson v. City of Louisville, 362 U.S. 199 (1960) 8

Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969) 10

United States v. Reidel, 402 U.S. 351 (1971) 7

United States v. Thirty-Seven Photographs, 28 L.Ed.2d 831 (1971) 9

Winters v. New York, 333 U.S. 507 (1948) 5

Statutes

RCW 9.68.101 2

Other Authorities

Report, Government Printing Office, p. 60 7

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ARGUMENT IN REPLY

I.

The State's brief further underscores the severe abridgement of protected speech inherent in the decision under review. While apparently conceding that the motion picture at issue is non-obscene under the constitutional standard,[1] respondent argues that the State courts were not required to assess it for alleged obscenity *vel non*, but were free to condemn it, and to impose criminal sanctions upon petitioner, because isolated passages were presum-

1. Material may not be suppressed as obscene, or its dissemination punished, unless three elements are proved: "[I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *A Book v. Attorney General of Massachusetts*, 383 U.S. 413, 418 (1966).

ably visible to persons outside the theatre (e.g., Resp. Br. 6, 10, 12). Respondent asserts that petitioner's conviction "merely restricts the exhibition of this film in a manner involving an obtrusive display," and says with apparent approval that the same motion picture has since been exhibited at an indoor theatre in the county where this prosecution arose, a fact not shown in the record (Resp. Br. 12). It is claimed that, although RCW 9.68.010 says nothing about allowing the exhibition of a film indoors while making it a crime to show the same film outdoors, the statute "as applied in this case is neither vague nor overboard [*sic*]" (Resp. Br. 13). Yet while implying that a different substantive standard applies under the statute to drive-in theatres than to conventional theatres, the State wholly fails to suggest what that second standard might be.

At least three basic constitutional infirmities pervade the State's argument outlined above:

1. The statute invoked here is a general obscenity law which, like those of the other States, permits the total suppression of an offending work as being outside the realm of protected speech. In no other area of communication do the States possess such power to suppress and punish as they wield in the area of obscenity. Guarding against the obvious dangers to First Amendment freedoms which inhere in that power, this Court has carefully developed a specific and narrow definition of obscenity in *Roth v. United States*, 354 U.S. 476 (1957), and subsequent cases (*supra*, footnote 1). Washington, in the case at bar, has thrust aside that constitutional meaning and convicted petitioner for exhibiting a film deemed partially "offensive" or "obtrusive" (A. 89, 93, 95, 96). In so doing,

it has deprived the general obscenity statute of its ascertainable meaning and rendered it fatally vague and uncertain.

That the statute as applied here is standardless is tacitly admitted by the State when it suggests that exhibitors adopt a private rating system as a measure of criminal liability. Referring to the Motion Picture Code and Rating Program, respondent says:

> "The movie industry imposes upon itself a rating system and when movies are given an X rating or limited to adults only, it is ample notice that they should not be displayed outdoors blatantly and obtrusively." (Resp. Br. 13)

Surely the *ex-post facto* invocation of an unofficial rating system cannot fill the office of a statutory standard of criminal law.[2]

2. There is no warrant in any of this Court's decisions for Washington's abandonment of the substantive standard of *Roth*. The "pandering" cases relied upon by the State in effect enunciated a rule of evidence while making clear

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2. Under the motion picture industry's voluntary rating system, known formally as the Motion Picture Code and Rating Program, films submitted are placed into one of four categories: *G* (general audiences; all ages admitted); *PG* (parental guidance suggested; some material may not be suitable for pre-teenagers); *R* (restricted; under 17 requires accompanying parent or adult guardian); *X* (no one under 17 admitted). There is nothing in the record of this case which indicates the standards upon which rating judgments are based, nor whether these rating standards would comport with what this Court determines to be the appropriate constitutional standards for determining whether a particular presentation may be punished on account of "obtrusiveness." It is obvious that X-rated films are not believed to be obscene by the industry representatives entrusted with the ratings, or they would not be circulated even for adult viewing. Moreover, reliance upon these ratings in this context would raise a substantial constitutional question as to unlawful delegation of legislative authority. See, *e.g.*, *Drive In Theatres, Inc. v. Huskey*, 305 F.Supp. 1232 (W.D.N.C. 1969), aff'd 435 F.2d 228 (4th Cir. 1970).

that an adjudication of obscenity *vel non* continues to be required in prosecutions under general obscenity statutes. *E.g., Ginzburg v. United States,* 383 U.S. 463, 475 (1966); *A Book v. Attorney General of Massachusetts,* 383 U.S. 413, 420 (1966).

Nor do the post-*Roth* cases lend the slightest support to the view that a State may disregard the requirement that the allegedly offending material be utterly without redeeming social importance. The absence of any such value is the foundation stone of obscenity law:

> "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Roth v. United States,* 354 at 484.

All ideas having even the slightest importance, including those most controversial or hateful, have the full protection of the constitutional guaranties, as does the portrayal of sex in works of art and literature. *Roth, supra,* 354 U.S. at 484, 487. This principle, above all others, is at the heart of First Amendment liberty. *Cf. New York Times v. Sullivan,* 376 U.S. 254 (1964).

3. Implicit in the State's argument is the notion that the constitutional standard of definiteness in a speech-restricting statute is less stringent where the aim is to preserve privacy. Yet this Court emphasized in *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676 (1968), that in a First Amendment context the permissible extent of vagueness is *not* variable with the purpose of the statute in question:

> "Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of

the power to regulate or control expression with respect to children.

"• • •

"The vices—the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailing of the effectiveness of judicial review—are the same." *Id.*, at 689-690.

It follows that a State cannot indulge in vagueness in a criminal statute directed to speech simply by asserting that it acts in the name of privacy. As the Court held in *NAACP v. Button*, 371 U.S. 415 (1963):

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.*, at 433.

As applied here, Washington's general obscenity statute subjects protected speech to unconstitutionally sweeping, vague, and unpredictable restraints. *Winters v. New York*, 333 U.S. 507 (1948). The inevitable result, unless petitioner's conviction is reversed, would be to impose a chilling censorship upon outdoor theatres and comparable activities throughout the nation.

II.

In response to petitioner's position that Washington's judicial extension of its obscenity statute to punish conduct not specified therein deprives him of due process of law (Pet. Br. 22-26), respondent argues that while a specific statute may be required to implement a State's concern for juveniles, none is necessary to support criminal prosecution of speech where privacy is allegedly invaded (Resp. Br. 9, 14). No authority is cited except the *per curiam* decision in *Redrup v. New York*, 386 U.S. 767 (1967), which does not stand for the proposition stated.

The State has overlooked the fundamental rule that the criminal statute itself, not the charge against the defendant, must specify the prohibited conduct:

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. [Citations omitted.] No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

Where State courts judicially enlarge a statute to make criminal, in a defendant's own case, that which was not made criminal before, the requirement of fair warning is breached and the conviction must be reversed. *Bouie v. Columbia*, 378 U.S. 347 (1964); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965).

The State suggests that *Cohen v. California*, 403 U.S. 15 (1971), is inapplicable because it was categorized by the Court as a non-obscenity case (Resp. Br. 15-16). But *Cohen*, a First Amendment case, is controlling because there, as here, a State had unconstitutionally imposed punishment upon speech uttered in a certain setting in the absence of a statute putting the defendant on notice that certain types of speech would not be tolerated in certain places. *Id.*, at 403 U.S. 19.

It is no answer to say that a constitutional right of privacy exists (Resp. Br. 6, 14). The existence of such a right cannot conceivably mean that one who engages in constitutionally-protected speech allegedly infringing upon privacy thereby subjects himself, without statutory warning, to the imposition of a jail sentence or fine.

In arguing to the contrary, respondent cites a recommendation of the Commission on Obscenity and Pornog-

raphy for restricting public displays of explicit sexual materials (Resp. Br. 11-12). To be accurate, the State should have quoted the Commission's sentence which comes immediately before the one quoted in its brief:

> "The Commission recommends enactment of state and local *legislation* prohibiting public displays of sexually explicit pictorial materials . . ." *Report,* Government Printing Office, page 60 (emphasis added). See also, page 67 for a draft of proposed legislation.

The Commission thus recommends the very element lacking here, *i.e.,* a statute particularly directed to obtrusive displays.

In *United States v. Reidel,* 402 U.S. 351 (1971), the Court discussed the need for legislation if obscenity standards are to change:

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. . . . This may prove to be the desirable and eventual legislative course. *But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances.* Roth and like cases pose no obstacle to such developments." *Id.,* at 402 U.S. 357; emphasis added.

Washington's action in bypassing the necessary legislation, and convicting petitioner of an unforseeable common law crime, is a denial of due process. *Bouie v. Columbia, supra.*

The State has, moreover, pointed to no evidence that any such crime was in fact committed. The required "publication in a manner so obtrusive as to make it impossible

for an unwilling individual to avoid exposure" (*Redrup, supra*, 386 U.S. 769) did not occur here. Nor is there any "showing that substantial privacy interests are being invaded in an essentially intolerable manner," *Cohen v. California*, 403 U.S. 15 (1971). Respondent's assertion that the outdoor screen "illuminates the nighttime sky of a residential area" (Resp. Br. 10) is devoid of support in the record. No one so testified. Nor can proof of guilt be supplied by such statements as "[t]he trial court recognized the obvious," or the "residents had a right to rely on their police officers" (Resp. Br. 15). The fact remains that there is no evidence that any non-consenting person complained about the film, or even saw any part of it.

Petitioner's conviction, which depends upon the assumption that some unknown viewer *might* have seen the film and been offended, cannot stand in the absence of proof. *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

III.

In most legal settings, an owner is entitled to notice and opportunity to be heard before being deprived of his property. *E.g., Goldberg v. Kelly*, 397 U.S. 254 (1970). That basic principle of fairness is doubly important where First Amendment freedoms are at stake. The film exhibitor, and the bookseller, should have the right to appear in court and present evidence and argument in support of the lawfulness of their communications materials before those materials are seized by the State. That right can only be assured if a pre-seizure adversary hearing is required.

Respondent argues that a distinction must be made between seizures aimed at suppression and those aimed at obtaining evidence for criminal prosecution (Resp. Br.

16, 19)[3] Yet there is as great a need for safeguards in criminal evidentiary seizures as in those made pursuant to civil litigation. A criminal prosecution affords no guarantee of prompt judicial determination of the obscenity *vel non* of the seized material. *Marcus v. Property Search Warrant*, 367 U.S. 717, 737-38 (1961). If non-obscene films are seized, there is no assurance that the unconstitutional suppression will be of short duration. *Cf. Freedman v. Maryland*, 380 U.S. 51 (1965); *United States v. Thirty-Seven Photographs*, 28 L.Ed.2d 831 (1971).

The present case illustrates the prolonged *de facto* censorship involved in criminal prosecutions. It is no answer to say that petitioner's justice court trial occurred within thirty-four days after the seizure (Resp. Br. 22). Petitioner's trial in Superior Court—the State court of general jurisdiction, at which those accused of gross misdemeanors are entitled to *de novo* trials, *State v. Miller*, 365 P.2d 612 (Wash. 1961)—did not commence for more than six month after the seizure. Another six months went by before the entry of findings and judgment, and the film was thus totally suppressed for more than a year prior to the entry of the judgment from which appeal was taken to the Supreme Court of Washington.

To treat such prolonged suppression as inconsequential because a film rather than a book is involved is to ignore reality. The effective result is to deprive a large audience of protected communication. *Astro Cinema Corp. v.*

3. *People v. Heller*, N.Y. Law Journal, Dec. 16, 1971 cited by respondent (Resp. Br. 19), represents a conflict with the federal decisions within the Second Circuit, which continue to uphold the adversary hearing requirement. See, *e.g.*, *Mod Amusement Company, Inc. v. Murphy*, (S.D.N.Y. 72 Civ. 1, filed January 7, 1972), following *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2nd Cir. 1969), cert. denied, 397 U.S. 920 (1970).

Mackell, 422 F.2d 293, 295 (2d Cir. 1970); and see Petitioner's Brief 31.

Courts have the power to compel the production of books and films, intact, for use in evidence at trials. A variety of ways to do this has been suggested, *e.g.*, *Astro Cinema Corp., Inc. v. Mackell*, 422 F.2d 293 (2d Cir. 1970) (court order or use of subpoena *duces tecum* requiring defendant, subject to contempt power, to make a copy of the film available to the prosecution); *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1970), *reversed on other grounds*, 39 U.S.L.W. 3424 (1971) (protective order by magistrate forbidding defendant to tamper with or remove film); *Bethview v. Cahn*, 416 F.2d 410 (2d Cir. 1969) (*ex. parte* restraining order forbidding tampering with or removal of film).[4]

Thus the interests of law enforcement can be served while First Amendment rights are protected.

Respondent here argues that, although the Justice of the Peace was unaware of the requirements of *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), he nonetheless fulfilled them (Resp. Br. 20). Yet obviously the procedure could not have "focused searchingly" on the question of alleged obscenity where the only evidence

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4. If the film is found obscene by the magistrate in the adversary hearing, and a prosecution commenced, there is in fact no valid reason why the film should not be returned to the exhibitor after the hearing until its character *vel non* is determined at trial, subject to the exhibitor or owner making it available to prosecuting officials for purposes of trial preparation. This procedure has been approved by several federal circuit courts and ensures maximum preservation of free speech rights pending a final judicial determination, without impeding the State's ability to prosecute the defendant. *Astro Cinema Corp. v. Mackell*, 442 F.2d 293 (2d Cir. 1970); *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1970); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969).

was the testimony of a police officer who had seen less than the entire motion picture and could not testify regarding its thematic content because he had viewed it from a distance without hearing the sound track (Pet. Br. 6, 7; 27). Petitioner should have been afforded a chance to present evidence. The seizure here, resulting in the suppression of a manifestly non-obscene film for many months, is striking evidence that only an adversary hearing will suffice in light of the First Amendment.

Respectfully submitted,

WILLIAM L. DWYER
JOHN S. EBEL
13th Floor, Hoge Building
Seattle, Washington 98104

REMBERT RYALS
1177 Jadwin Avenue
Richland, Washington 99352
Counsel for Petitioner

Of Counsel:
CULP, DWYER, GUTERSON & GRADER
13th Floor, Hoge Building
Seattle, Washington 98104

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
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Richland, Washington 99352